



**IT IS ORDERED as set forth below:**

**Date: September 24, 2010**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

In re:	:	
	:	BANKRUPTCY CASE NUMBER
<b>MATHAI KOSHY and</b>	:	<b>10-70547-MGD</b>
<b>MARIAMMA M. KOSHY,</b>	:	
	:	
Debtors.	:	
	:	
<b>GEORGIA LOTTERY</b>	:	
<b>CORPORATION,</b>	:	
	:	ADVERSARY CASE NUMBER
Plaintiff,	:	<b>10-06329</b>
v.	:	
	:	CHAPTER 7
<b>MATHAI KOSHY and</b>	:	
<b>MARIAMMA M. KOSHY,</b>	:	
	:	
Defendants.	:	

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

The above-styled adversary proceeding is before the Court on Mathai Koshy and Mariamma M. Koshy's ("Defendants") Motion To Dismiss ("Motion"). (Docket No. 5). Defendants' Motion was filed in response to Georgia Lottery Corporation's ("Plaintiff")

Complaint to Determine Dischargeability (“Complaint”), in which Plaintiff alleges that Defendants’ debt to Plaintiff is nondischargeable under 11 U.S.C. § 523(a)(4). (Docket No. 1). Defendants’ Motion denies those portions of Plaintiff’s Complaint alleging that 1) Defendants’ debt is nondischargeable under 11 U.S.C. § 523(a)(4) and 2) that Plaintiff did not receive sufficient notice to file a dischargeability complaint by July 12, 2010, the Rule 4007(c) bar date. (Docket No. 5). Plaintiff then filed a Response to Defendant’s Motion (“Response”), which is supported by a Retailer Contract to sell Georgia Lottery tickets (“Exhibit A”). (Docket No. 6).

For the reasons set forth herein, the Court **DENIES** Defendants’ Motion to Dismiss. Plaintiff sufficiently alleges that Defendants owed fiduciary duties to Plaintiff; that Defendants’ debt to Plaintiff results from Defendants’ defalcation while acting in a fiduciary capacity; that Plaintiff properly and timely filed an adversary proceeding objecting to the dischargeability of Defendants’ debt; and that therefore Defendants’ debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

## **I. FACTS**

The material facts as alleged by Plaintiff are as follows: on or about December 5, 2006, Defendant Mariamma M. Koshi signed a Retailer Contract, in the capacity as owner of Kel Kom Inc., d/b/a Kevin’s One Stop, to sell Georgia Lottery tickets. (Complaint ¶ 14; Exhibit A). Defendant Mathai Koshy is an officer of Kel Kom, Inc. D/b/a Kevin’s One Stop. (Complaint ¶ 13). Defendants filed their Chapter 7 petition on April 6, 2010, and the first meeting of creditors was held on May 11, 2010. July 12, 2010 was set as the Rule 4007(c) bar date for filing complaints to determine dischargeability of debt.

Pursuant to the Retailer Contract, Defendants agreed to sell lottery tickets, to deposit sales

proceeds into a special bank account, and to be bound by the Georgia Lottery for Education Act and the Georgia Lottery Retailer Rules and Regulations. (Complaint ¶ 14; Exhibit A). As officers and/or owners of a Georgia Lottery retailer, Defendants had a fiduciary duty to preserve and account for all proceeds from Georgia Lottery ticket sales. (Complaint ¶ 17). Defendants have failed to remit proceeds from sales of Georgia Lottery tickets to Plaintiff in the amount of \$6,022.01. (Complaint ¶¶ 15 and 16).

## **II. STANDARD APPLICABLE TO MOTIONS TO DISMISS**

\_\_\_\_ While Defendants' Motion does not state a specific legal basis on which it moves for dismissal, the Court presumes Defendants move for dismissal on the basis that Plaintiff fails to plead a claim for which relief can be granted and that Plaintiff's Complaint was untimely filed. Rule 12(b)(6) of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, permits a defendant in an adversary proceeding to move for dismissal in the event that a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6); FED. BANKR. P. 7012(b). A Defendant may also move for dismissal pursuant to Bankruptcy Rule 4007(c), which states that "a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." FED. R. BANKR. P. 4007(c). When reviewing a complaint to determine whether a claim upon which relief can be granted has been stated, the Court must accept as true the factual allegations of the complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249 (11th Cir. 2006). To survive a motion to dismiss, the Plaintiff's complaint must state sufficient factual allegations to infer each element of the

applicable cause of action. *In re Money*, 375 B.R. 704, 707 (Bankr. N.D. Ga. 2007).

### **III. APPLICATION OF LAW**

#### *A. Stating a claim upon which relief can be granted*

A discharge in a chapter 7 bankruptcy does not discharge debts that were incurred by “fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Defalcation while acting in a fiduciary capacity includes the failure to remit proceeds from the sale of Georgia Lottery tickets. *Georgia Lottery Corporation v. Ingram (In re Ingram)*, 2008 Bankr. LEXIS 1036, \*7 (Bankr. N.D. Ga. 2008). As to the element of fiduciary duty, the United States Supreme Court has articulated a narrow definition of “fiduciary,” holding that the trust upon which the fiduciary relationship relies must be an express or technical trust. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934). The Georgia Lottery for Education Act, codified at O.C.G.A. § 50-27-21, which governs Georgia Lottery retailers, sets forth all the elements of a technical trust. *In re Daniel*, 225 B.R. 249, 251–252 (Bankr. N.D. Ga. 1998). The Georgia statute creates a trust fund, identifies the trust *res*, and outlines a lottery retailer’s fiduciary duty “to preserve and account for lottery proceeds.” O.C.G.A. § 50-27-21(a). The trust *res*, which is comprised of “all proceeds from the sale of lottery tickets or shares,” includes “unsold instant tickets.” *Id.*

As to the element of defalcation, defalcation is “a failure to produce funds entrusted to a fiduciary,” but “does not have to rise to the level of ‘fraud,’ ‘embezzlement,’ or even ‘misappropriation.’” *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993). Therefore, a failure to preserve, account for, and remit proceeds or tickets under O.C.G.A. § 50-27-21 would constitute defalcation while acting in a fiduciary capacity. *Ingram*, 2008 Bankr. LEXIS at \*7. Thus, a debt

incurred as a result of failing to remit proceeds from Georgia Lottery ticket sales is nondischargeable under 11 U.S.C. § 523(a)(4). *Id.* at \*5-\*7.

In the present case, Plaintiff has alleged that Defendants contracted to be and were Georgia Lottery ticket retailers; that Defendants held and sold Georgia Lottery tickets; that Defendants had a duty to preserve and account for ticket sales proceeds; and that Defendants failed to remit a portion of said proceeds to Plaintiff. (Complaint ¶¶ 13 - 20). Consequently, Plaintiff has stated a claim upon which relief can be granted, and Defendants' Motion to Dismiss on this basis must be **DENIED**.

*B. Timely Filing of a Complaint to Determine Dischargeability*

A discharge in a chapter 7 bankruptcy does not discharge debts that were incurred by “fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Such debts are dischargeable, however, until the creditor requests the court to determine the dischargeability of that debt and the court determines that the debt should be excepted from discharge. 11 U.S.C. § 523(c)(1). The procedures for filing dischargeability objections in chapter 7 cases are governed by Bankruptcy Rule 4007(c), which states that “a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).” The rule further provides that “[t]he court shall give all creditors no less than 30 days’ notice of the time fixed in the manner provided in Rule 2002.” FED. R. BANKR. P. 4007(c).

While the plain language of Rule 4007(c) suggests that creditors must receive official notice of the bar date from the court, courts generally agree that the bar date applies to a creditor’s claim if the creditor had actual notice of the debtor’s bankruptcy more than thirty days

before the deadline. *E.g., In re Alton*, 837 F.2d 457, 460–461 (11th Cir. 1988) (holding that a creditor’s actual notice of debtor’s bankruptcy was sufficient to apply bar date to creditor’s claim when creditor knew of the bankruptcy seventy-seven days before the bar date); *and In re Gordon*, 988 F.2d 1000, 1001 (9th Cir. 1993) (holding that the creditor’s actual notice of debtor’s bankruptcy was sufficient for application of the bar date to creditor’s claim when creditor had notice fifty-seven days prior to the bar date). While some courts have held that Rule 4007(c) requires a minimum of thirty days’ notice, other courts have held that notice of fewer than thirty days could be sufficient to satisfy due process requirements. *In re Bateman*, 254 B.R. 866, 872 (Bankr. D. Md. 2000).

When the creditor receives fewer than ten days’ notice, however, then the creditor has not received notice early enough to satisfy the requirements of due process and the bar date cannot be applied to that creditor’s claim. *In re Dewalt*, 961 F.2d 848, 851 (9th Cir. 1992); *In re Linzer*, 264 B.R. 243, 250 (Bankr. E.D.N.Y. 2001) (holding that nine days’ notice is inadequate). In *Dewalt*, the Ninth Circuit held that seven days’ notice was insufficient to satisfy due process requirements when applying the Rule 4007(c) deadline, even for a creditor represented by counsel. 961 F.2d at 851. In the present case, Plaintiff received notice of Defendants’ bankruptcy case on the day of the 4007(c) bar date. Not only did Plaintiff receive less than ten days’ notice, but Plaintiff received less than one full day’s notice. Plaintiff was not notified of Defendant’s bankruptcy case in time for Plaintiff to investigate and preserve its rights prior to the 4007(c) bar date. Therefore, Plaintiff’s Complaint cannot be dismissed for failure to file on or before July 12, 2010, and Defendants’ Motion to Dismiss on this basis must be DENIED.

Accordingly, it is

**ORDERED** that Defendants' Motion to Dismiss is **DENIED**. The time for Defendants to file Answers to Plaintiff's Complaint is governed by Bankruptcy Rule 7012(a).

The Clerk shall serve a copy of this Order upon Plaintiff, counsel for Plaintiff, Defendants, and counsel for Defendants.

**END OF DOCUMENT**